FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 9 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1075 80

JACK PARKER, et al.,

Petitioners,

—*vs.*—

PAUL A. PORTER, Price Administrator.

PETITIONERS' REPLY BRIEF

ALEXANDER PFEIFFER,
Attorney for Petitioners.

TABLE OF CONTENTS

	PAGE
A. Importance of Issues Presented	1
B. Tenants Are "Subject to" Respondent's Order Authorizing Their Evictions	3
C. Extension of the Right to Protest and the Administration of the Act	8
Conclusion	11

CASES CITED:

Collins v. Porter (14 U. S. Law Week 4306)	4, 7
New York City Housing Authority v. Rokaw, 54 N. Y. Supp. 2d 570	8
Porter v. Lee (14 U. S. Law Week 3373)	3
Porter v. Picken (14 U. S. Law Week 3373)	3
Thomas Paper Stock Co. v. Bowles, 148 Fed. 2d 831	7
Thomas Paper Stock Company v. Porter (14 U. S. Law Week 4307)	4, 7
Utah Junk Company v. Porter (14 U. S. Law Week 4305)	4, 7
Werth v. Gordon, 270 App. Div. 255	7

Authorities Cited:

	PAGE
Emergency Price Control Act	
Section 2(d)	2
Section 203(a)	4, 5, 9, 10, 11
Section 204(a)	5, 11
Section 204(d)	5, 8
Revised Procedural Regulation No. 3	
Section 1300.216	4
Rent Regulation for Housing in New York City Defense-Rental Area	
Section 6(a)	5
Section 6(b)	5
Hearings before the Senate Committee on Banking and Currency, 78th Cong. 2d Sess. on S. 1764, pages 1474, 1475	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1075

JACK PARKER, et al.,

Petitioners,

—*vs.*—

PAUL A. PORTER, Price Administrator.

PETITIONERS' REPLY BRIEF

A. Importance of Issues Presented.

The government in its brief states that the "issue presented" of the tenants' right to judicial and administrative review "is important" (p. 4). The *amici curiae,* however, urge that this case does not present any question of sufficient substance to justify certiorari (p. 1).

On this petition a number of fundamental questions are raised which require determination by this Court: The three divergent opinons rendered in the Emergency Court of Appeals evidence the need for a definitive interpretation of the fundamental purposes of the defense-housing provisions of the Emergency Price Control Act:

(1) whether the Emergency Price Control Act is solely regulatory of prices or whether it protects tenants from eviction in this period of acute and critical housing shortages, and permits them to protest when their eviction is

authorized under circumstances which fail to comply with the requirements as promulgated by the Price Administrator;

(2) whether tenants have any legally recognizable rights under the Rent Regulation for Housing issued by the respondent, which specifically provides that "no tenant shall be removed from any housing accommodations" so long as he continues to pay rent, unless certain contingencies arise.

(3) whether tenants have any legal recourse where they allege that a "cooperative" scheme to oust them from possession was based on initial fraud and, in effect, capitalizes on the acute housing shortage and violates the expressed purpose of the Emergency Price Control Act to "prevent profiteering, hoarding, manipulation, speculation and other destructive practices resulting from abnormal market conditions or scarcity caused by or contributing to the national emergency."

(4) whether an undue burden in administrating the Act would be imposed if tenants were afforded an opportunity for administrative and judicial review.

Petitioners maintain that the Emergency Price Control Act created a right in tenants to maintain possession of defense-area accommodations as well as controlling the prices of such accommodations, since the "concern" of the Act with the cost of a dwelling necessarily implies an equal concern with the right to possess the dwelling. Sec. 2(d) of the Act, in defining the authority of the Price Administrator permits him to regulate "speculative or manipulative practices or renting or leasing practices (*including practices relating to recovery of the possession*) in connection with any defense-area accommodations." (Italics supplied.)

The Department of Justice showed its interest in hard-

ships resulting to tenants from improper evictions under the Act, in *Porter* v. *Lee*, and *Porter* v. *Picken* (14 U. S. Law Week 3373) in which this Court on April 29, 1946, granted certiorari to review the orders of the Circuit Court of Appeals (6th Circuit) which dismissed appeals by the Price Administrator from the orders of the District Court which refused to enjoin state court eviction proceedings. Such injunctions were sought by the Price Administrator on the ground that such evictions would violate the Emergency Price Control Act and the Rent Regulation for Housing issued thereunder. The Department of Justice in asking this Court to define the extent of the Court's authority in these cases, is reported to have warned that if landlords "can deprive tenants of all protection by evicting them before remedial action can be taken in the Federal Courts, they will be greatly encouraged to attempt unlawful evictions," and that "any break in the system of control would result in *grave hardships for tenants illegally evicted*, and an extreme pressure on the rent ceilings".

Possession of tenants as well as rent ceilings is within the ambit of the Emergency Price Control Act.

B. Tenants Are "Subject to" Respondent's Order Authorizing Their Evictions.

The government and the *amici curiae* argue that petitioners are not "subject to" the respondent's order authorizing their evictions since they are not required "to obey" the order and the tenants are neither prohibited from acting nor required to act (pp. 8-12, Respdt's br. pp. 5-9, Landlords' br.). This construction of the words "subject to" is artificial and was specifically disavowed by both the majority (p. 75, Record) and the minority (pp. 82-83, Record) of the Emergency Court of Appeals in their opinions below. It was there pointed out that the Price Administrator himself had extended the right to protest beyond this restrictive

and narrow construction. The direct effect of the Price Administrator's order is that the tenants will be evicted. The intervening state court order that is obtainable as a matter of course following respondent's certificate, does not alter the result of respondent's order. The language of Section 1300.216 of the Revised Procedural Regulation No. 3 is a limitation on the landlord, not the tenant.

This Court, in the recent OPA cases in which certiorari was granted, *Utah Junk Company* v. *Porter, Collins* v. *Porter, Thomas Paper Stock Company* v. *Porter* (14 U. S. Law Week 4305, 4306, 4307) liberalized the availability of protest proceedings under Section 203 (a) of the Act. In *Utah Junk Company* v. *Porter* (14 U. S. Law Week 4305), this Court permitted protest against a superseded price schedule and construed Section 203(a) as amended in favor of reviving a right to protest which had expired through non-user. The Court stated:

> "Congress liberalized the right to challenge the validity of price regulations so extensively as it did, even reviving rights theretofore lapsed, because it felt, as we have seen, that rights were unfairly lost through unfamiliarity with the technical requirements of emergency legislation. Price-fixing is not static; it is a continuing process. The considerations of fairness that led Congress to give relief are the same whether a regulation was revised or remained unchanged. There is not a hint that Congress intended to draw a line so artificial as the one the Administrator would have us draw".

In response to the arguments advanced on behalf of the Administrator that he ought not to be burdened with issues arising under superseded regulations, this Court declared: "The Administrator has the duty of enforcing the Act * * *

It is also suggested that protest proceedings under Section 203(a) as amended are not available to a protestant in petitioner's plight because the validity of the old schedule may be otherwise tested. * * * It surely does not commend itself to good sense to bar a direct protest to the Administrator so easily justified by an unstrained reading of the Act, because leave might be obtained to litigate the issue in a roundabout way, involving violations of a presumptively valid regulation."

This language is applicable in the instant case. Here the Rent Regulation for Housing in New York City Defense-Rental Area, Section 6(a) specifically provided that "no tenant shall be removed from any housing accommodations" so long as rent is paid, unless other eventualities occur. Whatever the precise definition of the tenants' rights under this Regulation, it is clear that the Price Administrator intended to accord to a tenant some possessory right which the tenant should be allowed to protect under the machinery for protest and complaint established under Sections 203(a) and 204(a) of the Emergency Price Control Act. Unless these procedures are available to the tenant, he cannot assert the invalidity of the Price Administrator's order in the state courts, for by Section 204(d) of the Act, such determination is limited to the Emergency Court of Appeals. Not, even a "roundabout way" is available to the tenants.

The duty of the Price Administrator to enforce the Act included the duty to exercise his discretion so that the eviction of tenants would not be "inconsistent with the purposes of the Act and this Regulation and would be likely to result in the circumvention or evasion thereof" (Section 6(b)(2) Rent Regulation for Housing New York City Defense-Rental Area). Whether this Regulation gave tenants a vested property right or merely accorded a governmental privilege, the Price Administrator abused his discretion in failing to recognize this "cooperative" scheme for what it was and in

failing to protect the tenants. The complaint alleges that this plan to evict the tenants was not a true cooperative, that although the owner swore "that said premises were worth not more than $1,000,000," (p. 8, Record), the purchase price of these "cooperative apartments" aggregated about $390,000 over and above a first mortgage of $1,500,000. This attempt to sell apartments for a substantial profit without any underlying equity capitalizes on the acute housing shortage and violates the intention of Congress in passing the Act as expressed in the preamble: "To prevent profiteering, hoarding, manipulation, speculation and other destructive practices resulting from abnormal market conditions or scarcity caused by or contributing to the national emergency".

In failing to recognize this cooperative scheme as evasive of the fundamental purpose of the Act, the Administrator failed to perform his duty to protect the tenants. The Price Administrator in this case entertained the protest of the *landlords* from a ruling made by three of his subordinates in favor of the tenants; he abused his discretion in dismissing the protest of the *tenants* from his ruling which reversed his three subordinates and found in favor of the landlords. Just as the Emergency Court of Appeals had jurisdiction to decide whether the Price Administrator went too far and abused his discretion in favor of a tenant, at the landlord's behest, so it has the correlative duty to consider whether the Administrator did not go far enough in protecting the tenants' interest. The Price Administrator either did not know, or chose to ignore, the fact that this cooperative venture takes advantage of the housing shortage and violates the spirit and letter of the Act.

Petitioners' contention that the interpretation of the Act made by the majority of the Emergency Court of Appeals denies them due process of law under the Fifth Amendment is not based on any "particular form of procedure" which

the tenants desire to follow. The tenants are willing to accept the form of procedure of protest and complaint defined by the Act. Their objection is that they have been given no remedy whatsoever to review the Price Administrator's determination and that if the Act is interpreted as precluding such right, such interpretation renders it *pro tanto* unconstitutional.

The truncated citations from *Collins* v. *Porter* and *Thomas Paper Stock Co.* v. *Porter* (pp. 5-6, Landlords' br.) do not rule to the contrary. The citation from the opinion of the New York Appellate Division in *Werth* v. *Gordon* (pp. 7-8, Landlords' br.) is gratuitous and *obiter dictum* on issues that were neither briefed nor considered in the state court and of which the state court had no jurisdiction. The question of the rights of tenants throughout the nation to protest their evictions which are sought by these cooperative schemes is for this Court to determine. The citation from the opinion of the Emergency Court of Appeals in *Thomas Paper Stock Co.* v. *Bowles*, 148 Fed. 2d 831 (pp. 6-7, Landlords' br.) must be viewed in the light of this Court's statement in *Collins* v. *Porter, supra,* that the ruling in *Thomas Paper Stock Co.* v. *Bowles*, 148 Fed. 2d 831 "we have reversed in *Utah Junk Co.* v. *Porter,* decided this day." (14 U. S. Law Week 4306.)

The respondent notes that when the renewal of the Emergency Price Control Act was under consideration in 1944 and 1945 proposals made for broadening the class of persons who might protest were rejected (p. 12). These proposals were made on behalf of trade associations, such as the National Retailers Association, which were seeking the right of protest on behalf of their members. Chester Bowles, then Price Administrator, stated that trade associations had such right (pp. 1474, 1475, Hearings before Senate committee on Banking and Currency on S. 1764). The rights of tenants to protest their eviction was not considered and rejected at these hearings.

C. Extension of the Right to Protest and the Administration of the Act.

It is urged that to extend to the "millions" of tenants in defense rental areas the right to protest "would be tantamount to asserting that Congress sought to nullify the purposes of the Act." (p. 6, Landlords' br.).

While the policy of administrative efficiency may be invoked to prevent judicial review of orders of the Price Administrator which fixes ceilings at too high a level, the same policy should not operate to strike down the right to judicial review *where possession is involved, particularly in this time of acute housing shortages.* Unless such right is accorded tenants, they are without remedy (Sec. 204(d) Act). The New York courts have held that the order of the Price Administrator may not be attacked collaterally. In *New York City Housing Authority* v. *Rokaw*, 54 N. Y. Supp. 2d 570, the Appellate Term of the New York Supreme Court held that a certificate authorizing a landlord to proceed under local law to evict a tenant is binding upon the state court.

This proceeding by which the tenant seeks to protect his possession granted him by the Regulation is similar to any possessory remedy at common law, such as ejectment. The effect of limiting the determination of respondent's orders to the emergency tribunal established under the Act implies that such tribunal will entertain a protest and complaint which seeks to protect rights arising from the actual operation of the Act. In the absence of hearing in such forum the wording of the Regulation that "no tenant shall be removed from any housing accommodations" would be without meaning.

The respondent contends that to permit tenants administrative and judicial review of the Price Administrator's orders which authorize their eviction "would increase the burden of administering the act manifold." (p. 4, Respdt's br).

The identical argument of increased administrative burdens has been raised frequently to prevent the expansion of the scope of protests. The fears expressed by such enlargement have not been justified. On April 27, 1944, Chester Bowles, then Price Administrator, appeared before the Senate Committee on Banking and Currency and urged that the time to file protests should not be enlarged from the 60 days then permitted under Section 203(a). Mr. Bowle's statement is reminiscent of the present claim made by the respondent. He stated (Hearings before the Senate Committee on Banking and Currency, 78th Cong. 2d Sess. on S. 1764, pages 1474, 1475):

> "There are very substantial reasons for suggesting that protests directed against the authority of a regulation as originally issued should be filed within 60 days of its issuance. It is of great importance from the point of view of industry as well as that of the Office of Price Administration that legal questions with regard to the basic authority of a regulation should be raised and settled as quickly as possible. • • •
>
> "The abolition of all time limitations upon the filing of protests would also create *serious administrative difficulties and would greatly handicap the enforcement of price and rent regulations.* If a protest could be filed at any time, irrespective of changed circumstances, the natural tendency of most violators of regulations would be to file a protest as soon as enforcement proceedings were brought against them. This step would frequently be taken merely for the purpose of delaying enforcement proceedings even though there were no substantial basis for the protest. The result would be not only that the enforcement would be greatly handicapped but also that the administrator would be confronted with frivolous protests which would absorb time and energies that could ill be spared from the consideration

of protests filed in good faith without reference to enforcement proceedings. As indicated more fully below, the inevitable effect would be to delay the disposition of bona fide protests * * *" (Italics supplied.).

Nevertheless, Section 203(a) was amended to permit protests to be filed "at any time." It does not appear that the Price Administrator's burdens were thereby unduly increased.

The respondent answers petitioners' argument that they became parties to the proceedings before the area rent director with a right to the full hearing of protest and complaint as defined by the Act, by stating that petitioners were acting as witnesses, unless they were asserting their own legal rights (p. 14). Petitioners were, in no sense, witnesses in the hearings. They were requested to participate and to submit briefs, as they did, in support of their contentions that certificates authorizing their evictions should not be issued, and over 1000 pages of testimony were taken. Landlords' witnesses cross-examined by tenants' counsel, briefs submitted in behalf of tenants and the tenants were considered as parties to the proceeding until the Price Administrator reversed the rulings of his three subordinates and for the first time held that the tenants had no standing to protest his reversal.

To hold that the tenants have a right to protest after they have participated in hearings which resulted in an ultimate order against them, would not, as the respondent contends (pp. 14-15) jeopardize the effective administration of the Act nor result in the assumption of a new administrative burden of great magnitude, because by the time the protest was filed by the tenants, the hearings had been held and over 1000 pages of testimony had been taken. What remained when petitioners filed their protest with the respondent was for him to determine the issues raised by the protest *on the merits* and to rule as a matter of substantive right whether

the alleged landlords had brought themselves within the terms of the superseded Regulation; and if so, whether they complied with its terms. Instead, the respondent sought refuge in dismissing the tenants' protests as a matter of procedure. This action has effectively blocked any judicial review of his actions by the tenants as parties aggrieved. Having reversed his subordinates' findings and rendered an opinion, the Price Administrator cannot contend that the effective administration of the Act would be jeopardized if he entertained petitioners' protest, denied it on the merits and allowed them to review his determination in the Emergency Court of Appeals.

CONCLUSION.

Tenants should be granted the right to protest under Section 203(a) and the right to file a complaint under Section 204(a) of the Emergency Price Control Act.

ALEXANDER PFEIFFER,
Attorney for Petitioners.

Dated, New York, May 7, 1946.